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No. 3086.

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Edward H. Phelan,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

ISIDORE B. DOCKWEILER,
DOCKWEILER & MOTT,
Attorneys for Plaintiff in Error.
G. C. O'CONNELL,
Of Counsel.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

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STATEMENT OF THE CASE.

(1) Character of the Case.

Plaintiff in error, Edward H. Phelan, was, on September 7, 1917, indicted in the District Court of the United States in and for the Southern District of California, southern division, for wilfully failing and refusing to present himself for and submit to registration under the act of Congress, approved May 18, 1917, and entitled "An act to authorize

the President to increase temporarily the military establishment of the United States." Said indictment charging that on June 5, 1917, which was the registration day appointed by Presidential proclamation under said act, said plaintiff in error was a male person who then had attained his twenty-first birthday, and who did not on that day attain and had not before that day attained his thirty-first birthday. The indictment further charged that plaintiff in error was not on June 5, 1917, an officer, or an enlisted man of the regular army, of the navy, of the marine corps, or of the national guard, or naval militia in the service of the United States, or an officer in the reserve corps, or an enlisted man in the enlisted reserve corps in active service. [Tr. page 6].

There were two trials of the case. On the first trial the jury was unable to agree, having stood according to common report 6 to 6, and the second trial was commenced October 17, 1917, before the Hon. Oscar A. Trippet, district judge and a jury. On this second trial, plaintiff in error was on October 19, 1917, found "guilty as charged in the indictment." [See Tr. p. 19]. Thereafter and before sentence plaintiff in error moved for a new trial [Tr. p. 146], which motion was by said court denied, plaintiff in error thereupon duly excepting [Tr. p. 29], and thereupon the court pronounced judgment sentencing plaintiff in error to imprisonment for a term of twelve months in the county jail of Los Angeles county, California, and that he thereupon be registered according to the provisions of said act of Con-

gress [Tr. p. 30]. All of the evidence introduced in the trial is embodied in a bill of exceptions appearing in the transcript [Tr. p. 31], and the case is now in this United States Circuit Court of Appeals on writ of error.

(2) The Facts.

It is the contention of the government that plaintiff in error Edward H. Phelan was born July 13, 1886. If such was, in fact the case, and plaintiff in error, Phelan, believed on June 5, 1917, that he was born on July 13, 1886, and wilfully failed and refused to register, then his conviction was obviously justified, but the plaintiff in error testified that he was born on March 13, 1886, and that so honestly believing and understanding on registration day, June 5, 1917, he did not register and that had he believed he was not 31 years of age he certainly would have registered. [Tr. p. 77.] If Phelan was born on March 13, 1886, he had attained the age of thirty-one years, two months, and twenty-three days on registration day. If he had been born on July 13, 1886, he would have lacked being thirty-one years on registration day by thirty-eight days.

(a) *Government's Opening Statement to Jury.*

In his opening statement to the jury, Mr. Gordon Lawson, deputy United States attorney, made the following promises and representations, to-wit: [Tr. p. 32 *et seq.*].

Your Honor and Gentlemen of the Jury: The Government expects that the evidence in this case will show (segregation and numbering being ours).

(1) That the defendant was born July 13, 1886; that would bring him within the requirements of the selective service act; and that on June 5, 1917, the defendant should have registered the same as the rest of the men who were required by that act to register.

We expect that the evidence will show

(2) that in 1886, before July 13, that those people who were in a position to know, acted upon the belief—and they had good grounds for believing—that the defendant was not in existence.

And we expect that the evidence in this case will show

(3) that the defendant knew that he was born July 13, 1886, and that through *all* the course of his life he acted on that belief.

We expect that the evidence will show

(4) that his mother and that his father, and that his brothers and sisters, and his friends who knew him, all believed and acted upon the belief that he was born July 13, 1886, and

(5) that in all the various experiences of this defendant's life, wherever the question of his age came up, it was always July 13, 1886, until June 5, 1917, and then for the first time were his friends aware, or did he ever announce to anybody that he was born March 13, 1886.

(6) That this defendant deliberately planned and contrived by holding himself out at this time as having been born on March 13, 1886, to avoid the service as required by the selective service act.

And, gentlemen of the jury, the United States, the ten million young men who registered on June 5, would expect you to find this gentleman guilty and require of him the same service as the rest of the men who were required to register on June 5th.

(b) *Witnesses for the Government.*

The only witnesses introduced by the Government were the following: George T. Jeffries [Tr. p. 34]; Wm. L. Price [Tr. p. 35]; Father Patrick Harnett [Tr. p. 35]; Mrs. Mary Isbell [Tr. p. 40]; Miss Rexie Dale [Tr. p. 44]; Haribet J. Rechsteiner [Tr. p. 44]; Mrs. Susie Daven [Tr. p. 44]; and Frank Daven [Tr. p. 60].

Mr. George K. Jeffries [Tr. p. 34] testified that he was a deputy county recorder at Los Angeles and that he had with him a book containing the declarations of homesteads for the year 1886, and that there was therein recorded a declaration of homestead signed by one Thomas Phelan on June 4, 1886. It was stipulated that Thomas Phelan was the father of plaintiff in error and that he was dead.

William L. Price [Tr. p. 35] testified that he was a deputy county clerk of Los Angeles county and that he had in his custody the will of Thomas Phelan which he had obtained from the files and records of the Superior Court and which will had been filed January 9, 1890.

The Reverend Patrick Harnett [Tr. p. 35] testified that he was a priest of the Roman Catholic Church

and as such had custody of the baptismal records, and that a priest who officiates at a baptism is supposed to record it, and who against the objections and exception of plaintiff in error was permitted to testify [Tr. p. 36] that the priest officiating at a baptism is obliged to record the date of the baptism, the name of the child baptized, the names of the parents of the child, *the date of the birth of the child,* and the names of the sponsors.

Monsignor Harnett also testified that he had the baptismal record for the year 1886 with him and that there was recorded therein the baptismal record of plaintiff in error, and that he had baptized the child, and Monsignor Harnett was permitted by the court in answer to a question put to him by the court itself, and against the objections and exception [Tr. p. 37] of plaintiff in error to testify that he had baptized the child on the eighth of August, 1886. Also Monsignor Harnett, against the objections of plaintiff in error and his exception was permitted to testify as to what was the teaching of the Catholic Church in regard to infants dying before baptism, to the effect that the teaching of the Catholic Church with regard to the salvation of infants who die without baptism is that no child who is unbaptized and dies before it obtains the use of reason can enter into the Kingdom of Heaven, and also notwithstanding the objections of the plaintiff in error and his exception Monsignor was permitted to answer this question.

"Q. Was there a practice in your church that was known to those parents concerning when the child should be baptized?"

To which question the monsignor replied as follows: "A. I don't know." [Tr. p. 39.]

The monsignor further testified that he did not remember the incident of the baptism at all and that the parents of the child lived about fifteen miles from the parish school.

Mrs. Mary Isbell [Tr. p. 40] testified that she knew the plaintiff in error and that she did not know exactly how many years she had been at Whittier, but that she had been a neighbor of the Phelan family ever since she had been there, probably forty years. That she had a daughter who was born July 11, she thought as well as she could remember, but she did not remember the year in which she was born; that she did not remember that Mrs. Phelan had been confined at about the same time that she was confined with her daughter Rexi Dale, and she could not say for certain whether Mrs. Phelan had visited her about the time of the birth of her daughter. She could not say so because she really did not remember. She could not say whether plaintiff in error was born after the time that she had been confined with her daughter Rexi Dale [Tr. p. 42]. She repeated that she declared she couldn't say because she didn't know whether Mrs. Phelan was confined with plaintiff in error at the same time when she was confined with her daughter Rexi Dale, and when again asked for the fourth time what her memory was of that occurrence against the objection of plaintiff in error, on the ground, among others. that she had already testified that she did not know [Tr. p. 43] she made answer as follows:

"Q. By Mr. Lawson: Well, according to your best recollection, Mrs. Isbell?" [Tr. p. 42.]

She replied by saying:

"A. Well, really, I couldn't tell you. Of course, I do not know anything about when he (referring to plaintiff in error) was born."

When practically the same question was again put, she again stated as follows: [Tr. p. 43.]

"Well, I declare I could not say because I don't know."

Then in answer to the following question, to-wit:

"Q. Well, what is your memory of that occurrence?"

And again the objections and exception of plaintiff in error, upon the ground among others that she had already testified she did not know, she answered as follows:

"A. Well, I thouht mine was the oldest. Of course, I couldn't say positively."

And again, "I don't know anything about how much, or anything about it, and I may be wrong in that."

On cross-examination, Mrs. Isbell testified that she was seventy years old and had had eight children and that she did not remember the year in which her daughter Rexi was born, and that she could not remember the year in which any of her children were born, and that owing to her age, she certainly had a very poor memory, and that it was difficult for her to

remember with any degree of certainty anything that occurred years ago.

Miss Rexi Dale [Tr. p. 44] testified that Mrs. Mary Isbell was her mother and that she did not know the age of the plaintiff in error and against the objections of plaintiff in error and his exception, Miss Dale was permitted to testify that she was born July 11, 1886.

Haribet J. Rechsteiner [Tr. p. 44] testified that he was financial secretary of Los Angeles Council, No. 621, Knights of Columbus; that the original application of the plaintiff in error for membership in the Knights of Columbus had been filed with the court records at the last trial; that he had received it from the supreme secretary; that he had attended the first trial and heard a part of the plaintiff in error's testimony in regard to the signing of the application, that he heard the middle of it, and that the plaintiff in error had admitted signing the application. The application referred to had been previously admitted in evidence as United States Exhibit No. 1 against the objections of plaintiff in error that no sufficient foundation had been shown therefor and his exception, and appeared to be the application of Edward Henry Phelan for membership in Los Angeles Council, Knights of Columbus, and was dated June 14, 1909, and in said application, said Phelan declared that he was born on the 13th day of July, 1886, and that he was then twenty-three years of age as computed from his nearest birthday.

Mrs. Susie Daven [Tr. p. 48] testified that she and her husband, Fred Daven, had been living on a ranch at Whittier belonging to Mrs. Phelan, mother of plaintiff in error from July 17, 1916, until May 14, 1917, on which date she left the ranch; that she knew plaintiff in error and that her husband during that period had worked for Mrs. Phelan. Against the objections of plaintiff in error and his exception to the ruling, the court permitted [Tr. p. 49] the witness to state that plaintiff in error had prior to May 14, 1917, and on May 6, 1917, stated that he would not register because he was not going to be killed for any other nation and he would disguise himself and go out into the mountains either of Arizona or Nevada.

It is to be borne in mind that the act authorizing the President to increase the military establishment of the United States had not been enacted until May 18, 1917, and that the President's proclamation providing for registration was not published until May 18, 1917.

The witness did not again see Edward Phelan, plaintiff in error, after leaving the ranch on May 14, 1917 [Tr. p. 51] and she was positive that Phelan made the statement about not registering on the first Sunday in May, 1917, which was May 6, 1917 [Tr. p. 52.] After May 6, 1917, she did not again hear Phelan talk [Tr. pp. 52-53.] That Phelan had made those remarks two or three times before; that her husband and her children heard Phelan make the remarks referred to, and that these remarks were made in the kitchen of the house on the Phelan ranch occupied by witness's family, and that the remarks were made by Phelan in the afternoon of May 6, 1917, between one and two

o'clock [Tr. p. 55.] She made no memorandum of what Phelan said.

Frank Daven [Tr. p. 60] testified that he was acquainted with plaintiff in error and worked on the same ranch with him and that he had a conversation with Phelan in regard to military service on the first Sunday in May, 1917, at home of witness on the Phelan ranch [Tr. p. 60], and against the objections of plaintiff in error and his exception to the court's ruling witness was permitted to testify as follows: "Mr. Phelan says—he says he never got to register; he don't want to get killed going to fight for France and England" [Tr. p. 61]. "He said he don't want to get killed for France and England and then go to war. He let his whiskers grow and get away in the mountains up in Nevada some place and the *board could not find him*" (p. 62.)

It is to be here observed that the "board" undoubtedly referred to was the exemption board, but which could not have been known to either Phelan or Daven or Mrs. Daven until after the enactment of the law on May 18, 1917, and the Presidential proclamation.

Daven also stated that "sometimes we talk about the war every day, because I am French and Phelan take the German side and I pay no attention after that." On cross-examination Daven testified that he was positive that the conversation testified to took place on the first Sunday in May, which was May 6, 1917; that his wife moved away from the Phelan ranch on a Sunday in May and that the said conversation he had with Edward Phelan took place on a Sunday morning about

half-past nine, or something like that. [Tr. p. 67.] Phelan did not live on the ranch where he worked, but was in the habit of visiting the place on Sundays. Upon objection by the Government and an exception reserved to plaintiff in error, the court would not permit the witness to answer the following question put to him by plaintiff in error, to-wit:

"Q. Did he (that is Phelan) ever do anything to you to make you feel unkindly toward him?"

Davin also testified as follows:

"Since April 1st, 1917, I had a controversy with Mr. Peterson in reference to the war. Mr. Peterson during all the time that I was working on the Phelan ranch, worked there, and Edward Phelan, as foreman, myself, Mr. Gunar Peterson and De La Real did all the work. Since the war broke out in 1914 there has been a great deal of talk on one side or the other with reference to the war. I was born in France, and naturally I am a Frenchman. I think Peterson was born in Sweden; so far as I understood he was born in Sweden. Since the war broke out I was not strong for anybody, but I am just like everybody; my sympathies were with France. Peterson, the Swede, was somewhat favorable to Germany, and between us two there was a great deal of conversation pro and con about the war."

(c) *Witnesses for Plaintiff in Error.*

On behalf of plaintiff in error the following testimony was adduced:

Edward Henry Phelan [Tr. p. 76] testified in his own behalf, stating that he resided at Whittier all of

his life and that he was born March 13th, 1886, and that he did not register on June 5, 1917, because he was past the registration age and that he honestly believed and understood that he was 31 years and past on registration day, and that had he believed that he was not 31 years of age, he certainly would have registered, and that he had no objections to the war either conscientious or otherwise [Tr. p. 77.] That up until four years ago his impression was that he was born on July 13th, 1886, and that four years ago that impression was corrected and during that four years he always believed that his birthday was March 13th, and that he got that information from his mother. He denied that on the first Sunday of May, 1917, or at any other time, he had, as testified by Susie Daven and Frank Daven, said that he would not register because he was not going to be killed for any other nation and would disguise himself and go up into the mountains, or used language of similar kind or import at any time whatsoever. That on June 5, 1917, he took Mr. Peterson, one of the employees on the ranch, to register; that he never advised any human being not to register.

The court would not permit plaintiff in error to offer evidence tending to show that the relations between him and the Davens were unfriendly to which ruling of the court plaintiff in error excepted [Tr. p. 81.] On cross-examination plaintiff in error testified that he was under the impression that he was born July 13, 1886, up until the year 1913; that he was living with his mother during that time and that whenever he had occasion to state his birthday prior to

1913 he would give it as July 13, and that he was 27 years old when he changed his mind. On redirect examination, it was attempted to be shown that a brother of plaintiff in error, named Joseph John, regarded and observed July 22 as his birthday when, as a matter of fact, years after, it was discovered that June 22 was his birthday, but the court would not permit the witness to be interrogated on this subject, to which ruling plaintiff in error excepted.

Mrs. Mary Phelan [Tr. p. 84] testified that she was the mother of plaintiff in error, sixty-eight years old, and had continuously resided at Whittier since 1863, that she was a widow, and that plaintiff in error, Edward Henry, was born March 13, 1886, and that there were present at the time of the birth a midwife by the name of Guara, and a woman by the name of Mrs. Martinez; that the midwife was dead and that Mrs. Martinez was in the court room; that she had had eight children and that she remembered the circumstances when Edward was born on March 13, 1886. On cross-examination she testified that she had always been under that impression, and always would be, and she never said anything differently and that she had always held him out as having been born March 13, 1886, and that she had no occasion to tell his birthday until four years ago when her son came there, wanted his birthday and that she never told anybody what his birthday was before that time.

A typewritten document was then shown the witness which had been filed in the Superior Court at Los Angeles county on February 10, 1892, which was

a petition to set apart a homestead, which had been signed by the witness, Mary Phelan, and which set out in *haec verba* a declaration of homestead that had been signed by Thomas Phelan alone, the husband of the witness, on June 4, 1886, in which declaration said Thomas Phelan stated that his family consisted of a wife and five children. Mary Phelan testified that she had six living children on June 4, 1886. An examination of the typewritten petition discloses that it states that at the time of the death of the husband he left him surviving, among other, plaintiff in error, "Edward *F.* Phelan, then aged about two years," when, as a matter of fact in any event said son's name was Edward Henry Phelan and he was then aged *about three years* instead of *about two years.* This petition signed and verified by Mary Phelan discloses how easily mistakes will be made in the preparation of documents.

The witness further testified that she was drawing a pension from the Government, that she had made several applications for the pension, but did not remember how many, that she tried it a long time and then stopped two or three years, and that she could not get it, and then a man back in Washington wrote to her. She did not remember when she finally got it. "Could not say whether it was eight years ago or not." Did not remember when she made the first application. While being examined in connection with her pension the witness, Mary Phelan, was shown in succession the two documents which are United States Exhibits No. 3 and 4, respectively, and which purported to be photostat copies of depositions made by

Mary Phelan in connection wtih her pension applications. The deposition in Exhibit No. 3 purports to have been made November 1, 1909, in which was set forth that she had six children living when her husband died, and that she had lost one before her husband died, and that the names and dates of birth were as follows:

"Eddie Henry, born July 13, 1886." [Tr. p. 100.]

In said Exhibit No. 4 was purported application for pension of one Mary Phelan, dated October 12, 1889, in which was set forth among the names and dates of birth of children the following:

"Eddie Phelan, of soldier, by applicant, born July 13, 1886." [Tr. p. 105.]

Also in Exhibit No. 4 was another application of Mary Phelan, dated August 15, 1890, reciting among the names and dates of birth of all the children the following:

"Eddie, born July 13, 1886."

Also application of Mary Phelan, dated May 12, 1908, in which appears the following after the statement of the names and dates of birth of all the children of the soldier now living and under sixteen years of age at date of soldier's death: "Edward H. Phelan, born July 13th, 1886, at Whittier." In said Exhibit No. 4 there was also a purported affidavit of Mary Phelan setting forth the date of the births of the children of said witness, and among them the following: "Edward H., July 13th, 1886, sworn to Oct. 31st, 1892."

Against the objections of plaintiff in error upon the grounds of incompetency, irrelevency and immateriality, and that no proper foundation had been laid therefor, each of said exhibits 3 and 4 were admitted in evidence by the court to which rulings plaintiff in error duly excepted.

The Exhibits 3 and 4 were merely photostat copies of another original document, which was not produced at the trial [Tr. p. 102, 112]; consequently none of these documents contained any original signature. It was not proven that the witness, Mary Phelan, had signed any of the originals of which Exhibits 3 and 4 purported to be photostat copies. Witness Mary Phelan was not asked if she had made any of aforesaid statements as to the age of Edward H. Phelan in any of said documents.

When Exhibit No. 3 was shown to the witness she was asked by the Government counsel the obviously impossible question: "Isn't that your signature?" [Tr. p. 95], because there was no signature anywhere on the document except the signature of the commissioner of pensions who made the certification. The witness answered the question by saying, "it looks like it, but I couldn't say whether it is or not."

And as to Exhibit 4, the Government counsel put this question: "Is that or is not your signature" [Tr. p. 97], and the witness answered as follows: "It looks like mine, but I couldn't say, I don't know whether it is or not."

After Exhibits 3 and 4 had actually been admitted in evidence and read to the jury and passed over to the jury for examination, the Government put upon

the witness stand Claya Taylor, who testified that she was a clerk to the United States attorney and that she partially had custody of the filing of papers, etc., and that she sent telegrams. [Tr. p. 15.] She identified the Government's Exhibit No. 5 as a carbon copy of a telegram sent from the office of the United States attorney. Plaintiff in error objected upon the usual grounds and that no foundation was laid therefor. Thereupon, against the objections and exception of plaintiff in error, the court admitted in evidence, Exhibit No. 5, which was a carbon copy of a purported telegram and which read as follows:

"Attorney General, Washington, D. C. Send to special examiner Uline Los Angeles original papers proving age and birth of Edward Phelan in pension application by Mary Phelan include any other evidence in pension files. Papers identified telegram Oct. 9 from Saltzgaber trial Oct. 16. Rush O'Connor U. S. Atty."

Thereupon against the objections of plaintiff in error and exception reserved, the witness identified a letter which is Government Exhibit No. 6 as having been received in the office of the United States attorney, and thereupon also against the objections of plaintiff in error and his exception this particular letter was introduced in evidence. It read as follows: [Tr. p. 118.]

"Department of Justice: RLD—LP.

Bureau of Investigation.

Washington, Oct. 10, 1917.

John R. O'Connor, Esq., Asst. U. S. Attorney, Los Angeles, Cal.

Dear Sir: Referring to your telegram to me of today, I enclose herewith copy of the baptismal and death records of the Cathedral of St. Vibiana, relative to the baptism of Edward Henry Phelan, copy of a deposition made by Mary Phelan on Nov. 10, 1909, in connection with her claim for pension as widow of Thomas Phelan, and copy of three applications for pension made Oct. 12, 1889, Aug. 15, 1890, and May 12, 1908, by Mary Phelan, certified under the act of Aug. 24, 1912, 37 statutes at large, page 498, section 3.

The commissioner of pensions considered it impracticable to send the original papers. I believe, however. that the certified copies will serve your purpose equally well.

Very truly yours,

A. B. Bielaski,

Chief."

Obviously the subsequent introduction in evidence of the carbon copy of a telegram, Exhibit No. 5, and the letter from A. B. Bielaski of the Department of Justice, Exhibit No. 6, could not justify the introduction in evidence of the alleged photostat copies constituting Exhibits 3 and 4. Exhibits 3 and 4 were not accompanied by any certificate of the commissioner of pensions to the effect that it was impracticable to

send the original papers. The only statement as to impracticability of sending the original papers was that of Mr. Bielaski, who was not connected in any manner whatsoever with the commissioner of pensions, or with the Pension Office and had nothing whatever to do with the keeping of the Pension Office records. His statement to the effect that the commissioner of pensions considered it impracticable to send the original papers is pure hearsay. This feature was called to the court's attention, but fruitlessly. [Tr. p. 119.]

Mrs. Maria Jesus de Martinez testified that she has been acquainted with the defendant Edward Phelan ever since he was born, that she knew his mother Mary Phelan since they were young girls. That she was present at the birth of Edward Phelan, that aside from a midwife who was dead over 20 years, there was no one present at defendant's birth except herself and Mrs. Phelan; that she did not remember the month that Edward was born, but that her son Gasper was born nearest Edward and that Gasper was going on 33 years of age, having been born on January 6; that Gasper was a year and a month or two older than Edward.

On cross-examination she stated that she had four children, but that she did not remember the years of the birthdays. She did not remember the year Gasper was born in, but she stated that he was going to be 33 years next January. She had it on a memorandum. The father used to mark it down as the children were born. That she had a family record of the births of her children.

The following old-time residents of the community in Los Angeles county, California, in which Edward Henry Phelan, plaintiff in error, has spent his whole life, testified that they were acquainted with the reputation of said Phelen in such community for truth and veracity and peace and quiet, and that the same was good, several of the witnesses adding that it was very good, or one saying it was most excellent, to-wit:

H. E. Collins [Tr. p. 122], horticulturist and manufacturer of fertilizers, resident of Los Angeles county for 28 years, who had known Phelan for possibly 18 years;

T. L. Gooch [Tr. p. 122], horticulturist, resident of Los Angeles county for 47 years, who had known Phelan all his life;

Max Schwed [Tr. p. 123], retired, resident of Los Angeles county for 48 years, who had known Phelan since childhood;

Mrs. Harriett W. R. Strong [Tr. p. 124], resident of Los Angeles county since 1888, who had known Phelan for 29 years;

A. H. Gregg [Tr. p. 124], rancher and land business, resident of Los Angeles county for 36 years, who had known Phelan since he was a little child;

George F. Prince [Tr. p. 125], vegetable buyer for California Vegetable Union, resident of Los Angeles county for 30 years, who had known Phelan for 7 or 8 years;

C. Sorensen [Tr. p. 125], resident of Los Angeles county for 51 years, who had known Phelan since his childhood, and

O. N. Souden [Tr. p. —], banker, resident of Los Angeles county for nearly 18 years and who had known Phelan for nearly 17 years.

(d) *Comment on Representation of Government Counsel as to the Proof He Would Make on Opening Statement.*

It must, therefore, be evident that the district attorney signally failed to submit to the jury the legal proof of the five propositions that he laid down in his opening statement and which propositions, to repeat, were as follows: [Tr. p. 32 *et seq.*]

(1) That the defendant was born July 13, 1886; that would bring him within the requirements of the selective service act; and that on June 5, 1917, the defendant should have registered the same as the rest of the men who were required by that act to register;

(2) That in 1886, before July 13, that those people who were in a position to know, acted upon the belief —and they had good grounds for believing—that the defendant was not in existence;

(3) That the defendant knew that he was born July 13, 1886, and that through *all* the course of his life he acted on that belief;

(4) That his mother and that his father, and that his brothers and sisters, and his friends who knew him, all believed and acted upon the belief that he was born July 13, 1886;

(5) That in all the various experiences of this defendant's life, wherever the question of his age came up, it was always July 13, 1886, until June 5, 1917, and then for the first time were his friends aware, or did he ever announce to anybody that he was born March 13, 1886; and

(6) That this defendant deliberately planned and contrived by holding himself out at this time as having been born on March 13, 1886, to avoid the service as required by the selective service act.

SPECIFICATION OF THE ERRORS RELIED UPON.

The plaintiff in error hereby specifies the following errors which he relies upon and intends to urge in this brief, to-wit:

I.

The court erred in allowing Father Patrick Harnett to answer the following question propounded by the Government on its behalf over and against the objections of plaintiff in error, and in refusing to sustain such objections, to which action of the court plaintiff in error duly excepted:

"Q. What are the facts that the priest is required to record?" [Tr. bottom of p. 35 *et seq.*]

Mr. Dockweiler: I want to object to the question upon the ground that it is incompetent, irrelevant and immaterial..

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

The Court: Read the statements. (Last statement read by the reporter as follows):

'He is obliged to record the date of the baptism, the name of the child baptized, the names of the parents of the child.'

The Witness (continuing): The date of birth, *the date of birth of the child,* and the names of the sponsors."

The baptismal record of the date of birth is hearsay.

II.

The court erred in allowing Father Harnett to answer the following question propounded by the court itself over and against the objections of plaintiff in error, and in refusing to sustain such objections and to which action of the court the plaintiff in error duly excepted, to-wit:

"Q. By the Court: Now, what date was the child baptized? [Tr. bottom of p. 37].

Mr. Dockweiler: Now, just one minute. Now, pardon me, Your Honor, I want to get in an objection. We object to that question upon the ground that the same is incompeent, irrelevant and immaterial, as the defendant contends, it is wholly immaterial to the issues in this case as to when the child was baptized in the Roman Catholic Church.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

The Court: Answer the question, Father Harnett.

A. I baptized the child on the 8th of August, 1886."

The date of baptism was immaterial, because it cast no legitimate legal light as to the date of birth of Phelan, and no question was involved of proving Phelan's existence in August, 1886.

III.

The court erred in allowing Father Harnett to answer the following question propounded by the court itself over and against the objections of plaintiff in error, and in refusing to sustain such objections, to which action of the court plaintiff in error duly excepted, to-wit:

"By the Court: Where? (That is with reference to the place of baptism.) [Tr. p. 38.]

Mr. Dockweiler: The same objection. The same ruling, I assume?

The Witness: I am not quite certain as to where the child was baptized, but I assume it was baptized in Los Nietos.

The Court: Anything further of this witness?"

IV.

The court erred in allowing Father Patrick Harnett to answer the following question propounded by the Government over and against the objections of plaintiff in error, and in refusing to sustain such objections, to which action of the court plaintiff in error duly excepted, to-wit:

"Q. By Mr. Lawson: What is the teaching, Father Harnett, in the Catholic Church in regard to infants dying before baptism? [Tr. p. 38.]

Mr. Dockweiler: We object to that as incompetent, irrelevant and immaterial.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

A. The teaching of the Catholic Church with regard to the death, or with regard to the salvation of

infants who die without baptism, is that no one, no child who is unbaptized and dies before it attains the use of reason can enter into the Kingdom of Heaven."

The teaching of the Catholic Church as to infants dying before baptism was wholly immaterial, and under the circumstances, could shed no legitimate legal light as to date of Phelan's birth.

V.

The court erred in allowing Father Patrick Harnett to answer the following question propounded by the Government over and against the objections of plaintiff in error, and in refusing to sustain such objections, to which action of the court plaintiff in error duly excepted, to-wit:

"Q. Was there a practice in your church that was known to those parents concerning when the child should be baptized? [Tr. p. 39.]

Mr. Dockweiler: Now we object to that question upon the ground that it is incompetent, irrelevant and immaterial and upon the ground that it assumes that the Monsignor knew what was in the minds of the parents of the child.

The Court: I will overrule the objection.

Mr. Dockweiler: Exception. I ask the question to be repeated.

The Court: Read it to him.

(Last question read by the reporter.)

A. I don't know."

The jury, or some of them, however, may have improperly drawn an inference that the parents of Phelan

did know what Catholics believed and that they believed that a child should be baptized as soon after birth as possible, and that the probability was that Phelan was born in July instead of March.

VI.

The court erred in admitting in evidence United States Exhibit No. 3, during the cross-examination of witness Mary Phelan, over and against the objections of plaintiff in error, and in refusing to sustain such objections, to which action of the court plaintiff in error duly excepted, to-wit:

Said United States Exhibit No. 3 was a document consisting of seven pages, purporting to be photostat copy of a deposition made by Mary Phelan, November 10, 1909, in connection with her claim for pension as widow of Thomas Phelan. [Tr. p. 102 and four preceding pages.] There was attached to said document the certificate of G. M. Saltzgaber, Commissioner of Pensions, dated October 10, 1917, certifying that said seven pages were true photostat copies of such deposition. Therefore, said document was not in any sense an original document and contained no original handwriting, or original signature, except the signature of said G. M. Saltzgaber. Said document contained among other things the following statement [Tr. p. 100]:

"My husband, Thomas Phelan, and I lived together as husband and wife until he died. We were not separated nor divorced. I have not married since my husband, Thomas Phelan, died. We had six children living when my husband died and we had lost one

before my husband died. The names and dates of birth are as follows:

* * * * * * * * *

Eddie Henry, born July 13th, 1886."

Said Exhibit No. 3 was admitted in evidence while the government was cross-examining witness Mary Phelan, presumably for purposes of impeachment, without proper identification thereof and without any proof whatever that the witness Mary Phelan had signed the original document of which said Exhibit No. 3 purported to be a photostat copy, and no foundation whatever was laid for the introduction of any photostat copy in place of the original. It was not properly shown that the original document, assuming that the same was in existence, could not have been produced, or that it was lost. The letter of A. Bielaski, Chief of the Bureau of Investigation, Department of Justice, who was not in any way whatsoever connected with the Department of Pensions or with the Commissioner of Pensions, or with the custody of the original deposition, if the same was in existence, could not justify the introduction in evidence of said Exhibit No. 3. The statement with reference thereto in said Bielaski letter that "the Commissioner of Pensions considered it impracticable to send the original papers," was pure hearsay.

Before said Exhibit No. 3 was admitted in evidence witness Mary Phelan was asked by Government counsel this question and replied as follows [Tr. p. 95]:

"Q. Isn't that your signature (exhibiting document to witness that is the purported photostat copy, Exhibit No. 3, which contained no original signature)?

A. It looks like it, but I couldn't say whether it is nor not.

* * * * * * * * *

Mr. Palmer (interposing): Let the reporter identify it as the one you just asked her about.

The Court: What exhibit is it? Let the clerk identify it. [Tr. p. 96.]

Mr. Lawson: Exhibit No. 3, Your Honor, for identification.

* * * * * * * * *

Mr. Lawson: Your Honor, may we now offer these two exhibits, marked 'Exhibits 3 and 4 for identification' as evidence? [Tr. p. 97.]

Mr. Dockweiler: Let us take one at a time.

The Court: Take No. 3.

* * * * * * * * *

Mr. Dockweiler: Take No. 3, yes. The document that is marked Exhibit No. 3 is dated October 10, 1917. That is the certificate thereto. We object to it upon the ground that the same is incompetent, irrelevant and immaterial and that no proper foundation has been laid therefor.

The Court: Just pass it up and let me see it. Mr. Lawson, will you kindly step up here, please? (Mr. Lawson thereupon steps to the bench.)

The Court: The objection will be overruled.

Mr. Dockweiler: I note an exception."

Thereupon Mr. Lawson read Exhibit No. 3 to the jury.

VII.

The court erred in admitting in evidence United States Exhibit No. 4, during the cross-examination of Mary Phelan, over and against the objections of plaintiff in error and in refusing to sustain such objections, to which action of the court plaintiff in error duly excepted, to-wit:

Said United States Exhibit No. 4 was a document consisting of eight pages, purporting to be photostat copies of three applications for pension made October 12, 1888; October 15, 1890; May 12, 1908, respectively, and an affidavit by Joaquin Bot and Mary Phelan on October 31, 1892, and filed by Mary Phelan, as widow of Thomas Phelan, in the Bureau of Pensions. [Tr. p. 112 and eight preceding pages.]

There was attached to said document certificate of G. M. Saltzgaber, Commissioner of Pensions, dated October 10, 1917, certifying that said eight pages were true photostat copies of said three applications for pension and affidavit. Therefore, said document was not in any sense an original document and contained no original handwriting, or original signatures, except the signature of said G. M. Saltzgaber. Said document contained among other things the following statements:

"That the following are the names and dates of birth of all his legitimate children yet surviving who were under 16 years of age at father's death (that is, Thomas Phelan, husband of Mary Phelan), viz.:

* * * * * * * * *

8. Eddie Phelan of soldier, by applicant, born July 13, 1886." [Tr. p. 105.]

Also

"That names and dates of birth of all the children now living under 16 years of age of the soldier (that is, of Thomas Phelan, husband of Mary Phelan) are as follows:

Eddie, born July 13, 1886." [Tr. p. 107.]

Also

"That the names and dates of birth of all the children of soldier (that is, of Thomas Phelan, husband of Mary Phelan) now living and under 16 years of age at the date of soldier's death are as follows:

* * * * * * * * *

Edward H. Phelan, born July 13, 1886, at Whittier." [Tr. p. 110.]

Also

"That the date of the births of the children of said soldier is as follows:

* * * * * * * * *

Edward H., July 13th, 1886." [Tr. p. 112.]

Said Exhibit No. 4 was admitted in evidence while the Government was cross-examining witness Mary Phelan, presumably for purposes of impeachment, without proper identification thereof and without any proof whatever that the witness Mary Phelan had signed any of the original documents of which said Exhibit No. 4 purported to be photostat copies, and no sufficient foundation whatever was laid for the introduction of any photostat copies in place of the originals. It was not properly shown that the original documents, assuming that the same were in existence, could not have been produced, or that they were lost. The letter of

A. Bielaski, Chief of the Bureau of Investigation, Department of Justice, who was not in any way whatsoever connected with the Department of Pensions, or with the Commissioner of Pensions, or with the custody of the original applications and affidavit, if the same were in existence, could not justify the introduction in evidence of said Exhibit 4. The statement with reference thereto in said Bielaski's letter, "the Commissioner of Pensions considered it impracticable to send the original papers," was pure hearsay.

Before said Exhibit 4 was admitted in evidence witness Mary Phelan was asked by the court and Government counsel these questions and replied as follows [Tr. p. 97]:

"The Court: That is not the question. Do you think it is your signature or do you think it is not your signature?

Mr. Dockweiler: This is no original document.

Q. By Mr. Lawson: Is that or is it not your signature?

A. It looks like mine, but I couldn't say. I don't know whether it is or not.

Mr. Lawson: I submit this also for identification.

The Court: It will be No. 4 for identification. (The document so offered and identified was thereupon marked 'United States Exhibit No. 4.')

Mr. Lawson: Your Honor, may we now offer these two exhibits marked 'Exhibits 3 and 4 for identification' as evidence?

Mr. Dockweiler: Let us take one at a time. [Tr. p. 97.]

* * * * * * * * *

Mr. Lawson: Your Honor, I submit these other applications as evidence, as Exhibit Number 4. [Tr. p. 102.]

The Court: Exhibit 4.

Mr. Dockweiler: We object to the introduction of Exhibit Number 4 on the ground that the same is incompetent, irrelevant and immaterial, no sufficient foundation having been laid therefor. Of course, it is stipulated that these documents, upon their face, do not appear to be original documents, but appear to be what are known as photostats, whatever that may be.

Mr. Lawson: The certificate on the outside clearly indicates the character of the copy. It is a photostat copy of the written record. [Tr. p. 103.]

The Court: That raises a new question to me. I do not know anything about it.

* * * * * * * * *

The Court: The objection will be overruled.

Mr. Dockweiler: I note an exception."

Mr. Lawson thereupon read U. S. Exhibit No. 4 to the jury.

VIII.

The court erred in overruling the objections of the plaintiff in error to certain questions propounded by Government counsel to the witness Mary Phelan while she was being examined as to entries of the birth of her children in U. S. Exhibit No. 4, and to which ruling plaintiff in error duly excepted, as follows, to-wit [Tr. p. 113]:

"Q. By Mr. Lawson: I also want to call your attention, Mrs. Phelan, in Government's Exhibit No.

4, the first page the entries of the births of your children, if that is in your own handwriting?

A. I don't know.

Q. Is or is that not, your handwriting?

A. I don't know; I couldn't say; I don't remember writing that.

Q. Does it appear to be your handwriting?

A. No.

* * * * * * * * *

[Tr. p. 114]:

The Court: I think, Mr. Lawson, you will have to show me some authorities on the subject. You can ask her if she made certain statements in that document.

Q. By Mr. Lawson: I ask you again, Mrs. Phelan, if that is in your handwriting?

A. I don't remember; I can't say.

* * * * * * * * *

The Court: Well, you may ask her if it is a photographic copy of her handwriting.

Q. By Mr. Lawson: Is that a photographic copy of your handwriting?

A. I don't remember—

Mr. Dockweiler: Now, Mrs. Phelan, one minute, we object to the question as incompetent, irrelevant and immaterial, and not cross-examination and assumes a fact not proven.

The Court: The objection will be overruled.

Mr. Dockweiler: Exception.

Q. By Mr. Lawson: Is that your handwriting?

A. I don't remember; I don't remember if I wrote it.

The Court: That was not the question I gave you leave to ask.

Q. By Mr. Lawson: Is that a photographic copy of your handwriting?

A. I don't remember.

Mr. Dockweiler: One minute now, I renew my objections.

The Court: Well, the objection will be overruled to that.

Mr. Dockweiler: Exception."

IX.

Grave error was committed in the trial of the case, highly prejudicial to plaintiff in error [see affidavit of R. T. Walters, Tr. p. 148], when Mr. Gordon Lawson, Assistant United States Attorney, in making the closing argument to the jury on behalf of the Government, among other things argued and stated to the jury, against the objections of counsel for plaintiff in error, and in the first instance, without any remonstrance or correction whatever by the court, and, in the second instance, without any remonstrance by the court of the conduct of counsel for the Government, and without any adequate correction, made the following statement to the jury, to-wit:

"Then Mr. Dockweiler said: 'Let us go bravely through the evidence.' And I want to say, Mr. Dockweiler, that you surely have valor; and I pay him tribute for the braveness with which he went to the evidence and it did require a courageous man, gentlemen of the jury, to go through all of that evidence. And he did the best he could; he did as well as any-

body could do, and he is a valorous man. He said certain witnesses testified to nothing. Of course, why? Of course, *because he would not let them. That is why they did not testify. Why the suppression of the facts, gentlemen of the jury? Why didn't they want these facts to get to you? And then he goes up and says they testified to nothing.* It is only because of the power of counsel—

Mr. Dockweiler: May it please the court, I now assign as error the remarks just made by the prosecuting counsel in commenting upon my effort representing the defendant in this case to keep out evidence that the court held was improper and thereby appealing to the prejudice and other instincts of the jury.

Mr. Lawson: That remark—

Mr. Dockweiler: I assign it as error.

The Court: Proceed with the argument.

Mr. Lawson: That remark was referred to by Mr. Dockweiler. You said they didn't testify. And again, I repeat, the reason they didn't testify was because Mr. Dockweiler would not let them testify. *Evidently you can draw from that only one conclusion* that those facts were to be withheld from you—

Mr. Dockweiler: If the court please, I want to assign the remarks just made by counsel since my first objection as error, and I urge and assign them as error.

The Court: The jury will not consider the remarks of the United States Attorney coming to a conclusion from this evidence. The jury have no right to consider any evidence that was excluded." [Tr. p. 128.]

As appears from the above citation of the record, the court, on the strenuous objection of counsel for plaintiff in error, took no action and made no comment in the first instance except to tell Mr. Lawson to "proceed with the argument," thereby approving Mr. Lawson's unjust, unfair, and unwarrantable criticism; and in the second instance, it will also appear that the court did not reprove or remonstrate with Government counsel, Mr. Lawson, nor did the court tell the jury that they must not be prejudiced in any way against plaintiff in error, because of his objections to any evidence, or because of the exclusion of any evidence by reason of the making of such objections. The court should also at that very time have warned the jury that it was the duty of counsel for plaintiff in error to object to any offered evidence which in his opinion would not be legal evidence in the case. On several occasions counsel for plaintiff in error caused the exclusion of testimony. [Tr. pp. 34, 35, 44, 115.]

X.

The court erred in allowing Miss Rexi Dale to answer the following question propounded by the Government and over and against the objections of plaintiff in error, and in refusing to sustain such objections, to which action of the court defendant duly excepted, to-wit [Tr. p. 44]:

Miss Dale had just testified that Mrs. Isbell was her mother and that she did not know the age of plaintiff in error, Edward Henry Phelan.

"Q. And when were you born, Miss Dale?

Mr. Dockweiler: We object to that as irrelevant and immaterial.

The Court: Objection overruled.

Mr. Dockweiler: Exception.

A. I was born July 11, 1886."

XI.

The court erred in refusing to permit Government witness Frank Daven to answer the following question propounded to him by plaintiff in error on cross-examination upon the objections of the Government, to which action of the court plaintiff in error duly excepted, to-wit:

Said Frank Daven was a witness for the Government and had testified that Phelan, plaintiff in error, had stated that he had had a conversation with Phelan in regard to military service the first Sunday in May (May 6, 1917) at his home on the Phelan ranch in the presence of his wife and daughter and that

"Mr. Phelan says, he says he never got to register; he don't want to get killed going to fight for France and England—he says he don't want to get killed for France and England and then go to war. He let his whiskers grow and get away up in mountains up in Nevada some place, and the Board couldn't find him. [Tr. pp. 61 and 62.]

Q. Did he (referring to Edward Phelan) ever do anything to you to make you feel unkindly to him? [Tr. p. 67.]

Mr. Palmer (of counsel for the Government): We object to that if the court please, as incompetent, irrelevant and immaterial.

The Court: The objection will be sustained.

Mr. Dockweiler: Exception."

XII.

The court erred in refusing to allow Edward Henry Phelan, plaintiff in error, upon the objections of counsel for the Government, to testify and give evidence tending to show that the relations between him and the witness, Mrs. Daven, were unfriendly, to which action of the court plaintiff in error duly excepted, to-wit [Tr. p. 81]:

On the direct examination of Phelan, plaintiff in error, the following questions were put to him by his counsel, Mr. Dockweiler, and the following objections were made by Mr. Palmer, counsel for the Government, and the rulings of the court were as hereinafter set forth:

"Q. By Mr. Dockweiler [Tr. p. 80]: Mr. Phelan, with reference to the Davens, what, if anything, occurred near or about the first of May in connection with Mrs. Daven and your relationship with Mrs. Daven in reference thereto?

A. Why, when Mrs. Daven—

Mr. Palmer: If the court please, we object to that question as incompetent, irrelevant and immaterial.

The Court: The objection will be sustained.

Mr. Dockweiler: I desire, Your Honor—exception to the ruling—I desire, Your Honor, now at this time to show by this witness—

Mr. Palmer: We object if the court please, to counsel stating in the presence of the jury a matter that he proposes to prove, that the court has ruled to be incompetent.

Mr. Dockweiler: Well, how may I—

The Court: I suppose, Mr. Dockweiler, that your idea is to offer evidence tending to show the relations, whether friendly or otherwise, between this defendant and the other people?

Mr. Dockweiler: Yes, Your Honor.

The Court: The evidence is immaterial. In a collateral matter of that kind, you are bound by the answer of the witness, as I understand the law—and if you want to state—if you want to make a record of it, you may write out what you desire to say and file it with the reporter, and consider it as being your offer on that question."

XIII.

The court erred in refusing to allow Edward Henry Phelan, plaintiff in error, upon the objections of the counsel for the Government, to answer the following question put to him by his counsel for the purpose of showing that for years a brother of Mr. Phelan's had been mistakenly observing his birthday in a month other than the one in which he was born, to-wit [Tr. p. 83]:

"Q. Mr. Phelan, was there any other instance in your family of a brother for years observing a birthday in one month erroneously?

Mr. Lawson: Your Honor, objected to as incompetent, irrelevant and immaterial.

The Court: I will sustain the objection.

Mr. Dockweiler: Exception. I desire to prove by this witness—

Mr. Lawson: Now, Your Honor, object to what counsel expects to prove when the objection has been sustained.

The Court: Well, I will withdraw the ruling and let him state it.

Mr. Dockweiler: I offer to show by this witness, Your Honor, that the brother of this witness, John Joseph Phelan, five years regarded and observed July 22 as his birthday, when, as a matter of fact, years after it was discovered or ascertained that June 22 was his birthday.

Mr. Lawson: Your Honor, that witness is in court and can be produced; it is the best evidence.

The Court: Well, the objection will be sustained now.

Mr. Dockweiler: That is all. Exception."

XIV.

The court erred in refusing to allow Mary Phelan, the mother of plaintiff in error, upon the objections of counsel for the Government, to testify regarding her other son, John Joseph Phelan, mistakenly observing a date in a wrong month as his birthday, as follows, to-wit [Tr. p. 85]:

"Q. Do you know whether John Joseph Phelan had for any period of time regarded July 22 as his birthday—

Mr. Lawson: Just a minute.

Mr. Dockweiler (continuing): —instead of his real birthday, June 22?

Mr. Lawson: Your Honor, I object to that as incompetent, irrelevant and immaterial.

Mr. Palmer: Leading and suggestive.

Mr. Lawson: And leading and suggestive, and calling for a conclusion of the witness.

The Court: Wait a minute. The objection will be sustained.

Mr. Dockweiler: Exception.

Q. Do you know whether your son, John Joseph Phelan, for any period of time had mistakenly regarded a certain day as his birthday?

Mr. Lawson: Just a minute now; don't answer that. Objected to on the same ground, Your Honor.

Mr. Dockweiler: Exception. Cross-examine.

XV.

The court erred in admitting in evidence U. S. Exhibit No. 5, during the examination of Government witness, Claya Taylor, over and against the objections of plaintiff in error, and in refusing to sustain such objections, to which action of the court plaintiff in error duly excepted, to-wit: Said U. S. Exhibit No. 5 purported to be a carbon copy of a telegram purporting to have been sent to the Attorney General at Washington by O'Connor, United States Attorney, and reading as follows, o-wit:

"Western Union Telegram
Charge Government Rating
Los Angeles, Cal. 10-9-17

Attorney General
Washington, D. C.

Send to special examiner Uline Los Angeles original papers proving age and birth Edward Phelan in pension application for Mary Phelan include any other evidence in pension files papers identified October ninth from Satzgaber trial October sixteenth Rush O'Connor U. S. Atty."

Plaintiff in error objected to introduction in evidence of Government Exhibit No. 5 on the ground that the same was incompetent, irrelevant and no foundation had been laid therefor, which objection was overruled by the court and to which ruling of the court plaintiff in error duly excepted.

There was no justification for the admission in evidence of said carbon copy of purported telegram and its admission in evidence was prejudicial to plaintiff in error. The telegram requested the Attorney General to send to Los Angeles *"original papers proving age and birth Edward Phelan in pension application for Mary Phelan."* This statement, coupled with the introduction in evidence of Government Exhibits No. 3 and No. 4, respectively, undoubtedly impressed upon the jury the fact that the exhibits themselves, 3 and 4, proved the birthday of Edward Phelan to have been July 13, 1886.

XVI.

The court erred in allowing Claya Taylor, a witness for the Government, to answer the following questions proposed to her by Government counsel against the objections and exception of plaintiff in error, to-wit [Tr. bottom of p. 115]:

"Q. Can you identify that telegram (referring to U. S. Exhibit No. 5), Miss Taylor, as having been sent from the office of the U. S. Atty.?

A. It is a carbon of the telegram.

Mr. Dockweiler: One minute, what is that question?

(Last question read by the reporter.)

Mr. Dockweiler: We object to that question upon the ground that it is incompetent and irrelevant and immaterial.

The Court: The objection is overruled.

Mr. Dockweiler: No foundation laid for it. Exception.

Q. By Mr. Lawson: Just answer the question.

A. I recognize it as a carbon copy of a telegram sent from the office."

Thereupon Government counsel offered said carbon copy of telegram as U. S. Exhibit No. 5 and thereupon the following objections and ruling were made and action taken, to-wit:

"Mr. Dockweiler: Objected to on the ground that it is incompetent, irrelevant and immaterial, and no foundation therefor.

The Court: The objection will be overruled.

Mr. Dockweiler: No sufficient foundation therefor has been laid, and not the best evidence.

The Court: Overruled.

Mr. Dockweiler: Exception."

Thereupon said carbon copy of telegram was admitted in evidence as U. S. Exhibit No. 5.

XVII.

The court erred in admitting in evidence U. S. Exhibit No. 6 during the examination of Claya Taylor, witness for the Government, over and against the objections of plaintiff in error, and refusing to sustain such objections, to which action of the court the plaintiff in error duly excepted, to-wit: Said U. S. Exhibit No. 6 purported to be a letter addressed to John R. O'Connor, Assistant United States Attorney, by A. B. Bielaski, Chief of Bureau of Investigation in the Department of Justice, and which letter was in the words and figures following, to-wit:

"Department of Justice, R. L. D. L. P.
Bureau of Investigation
Washington, October 10, 1917.

John R. O'Connor, Esquire,
Assistant United States Attorney,
Los Angeles, California.

Dear Sir:

Referring to your telegram to me of today, I enclose herewith copy of the baptismal and death records of the Cathedral of St. Vibiana, relative to the baptism of Edward Henry Phelan, copy of a deposition made by Mary Phelan on November 10, 1909, in connection with her claim for pension as widow of Thomas Phelan, and copy of three applications for pension made

October 12, 1889, August 15, 1890, and May 12, 1908, by Mary Phelan, certified under the act of August 24, 1912, 37 Statutes at Large, page 498, section 3.

The Commissioner of Pensions considered it impracticable to send the original papers. I believe, however, that the certified copies will serve your purpose equally well.

Very truly yours,

A. B. Bielaski, *Chief.*"

Presumably the above letter was admitted in evidence as an answer to the carbon copy of telegram which was U. S. Exhibit No. 5, and particularly because said letter contained the following statement, to-wit: "The Commissioner of Pensions considered it impracticable to send the original papers. I believe, however, that the certified copies will serve your purpose equally well." As to what the Commissioner of Pensions *considered* is purely hearsay and a conclusion.

Counsel for plaintiff in error particularly requested the court, even after the Bielaski letter had been introduced and read in evidence, to personally read the letter [Tr. top of p. 119], but the court still insisted that its ruling should stand, admitting the letter in evidence. The court at the time making this observation:

"Of course, the court must take judicial notice that Bielaski is the Chief of the Pension Department, and his superior, of course, is the Commissioner of Pensions. Bielaski is the man who should have charge of these things and send them out, but he should do it only with permission of his chief or senior officer. Let the ruling stand.

Mr. Dockweiler: Exception."

We do not understand how the court could conclude that Bielaski was Chief of the Pension Department or that his superior was the Commissioner of Pensions, or that Bielaski was the man who should have charge of the applications for pensions made by Mary Phelan, copies of which were introduced in evidence as U. S. Exhibits No. 3 and No. 4, respectively, or for that matter, any other pension papers. The court's conclusion in this respect was entirely wrong. A. B. Bielaski was on October 10, and still is, Chief of the Bureau of Investigation in the Department of Justice, as is indicated by the letter itself, and then again O'Connor did not telegraph to the Pension Bureau; he telegraphed to the Attorney General for Mary Phelan's pension applications. The Government is challenged to show by any record or publication of any kind whatsoever that A. B. Bielaski was in any manner connected with the Pension Department, or had custody of any pension papers whatever, or particularly had the custody of original papers of which U. S. Exhibits No. 3 and No. 4 purport to be photostat copies.

XVIII.

The court erred in admitting in evidence U. S. Exhibit No. 1 during the examination of Haribet J. Rechsteiner, the witness for the Government, over and against the objections of the plaintiff in error, and in refusing to sustain such objections, to which action of the court the plaintiff in error duly excepted, to-wit: Said U. S. Exhibit No. 1 was a document purporting to be an application of the plaintiff in error for membership in the Knights of Columbus, which application

was dated June 14, 1909, and in which application there was a statement that the applicant was born on the 13th day of July, 1886. The witness Rechsteiner was shown the application admitted in evidence as U. S. Exhibit No. 1 and identified it as having been received by him from the Supreme Secretary of the Knights of Columbus, the witness Rechsteiner being financial secretary of the Los Angeles Council 621 of said Knights of Columbus.

Thereupon the following proceedings took place [Tr. p. 45]:

"Mr. Lawson: Your Honor, I offer this application of the plaintiff in error as evidence.

Mr. Dockweiler: We object to it, Your Honor, upon the ground that it is incompetent, irrelevant and immaterial, no sufficient foundation having been shown therefor.

The Court: I do not know as I understand this.

Mr. Palmer: It is the application of the plaintiff in error for admission as a member of the order of Knights of Columbus.

Mr. Lawson: The Knights of Columbus, and he there states or sets out his birthday and signs the application. The signature is attached thereto.

The Court: The objection will be overruled.

Mr. Dockweiler: I note an exception.

Mr. Lawson: We submit this as Government Exhibit No. 1.

(The document so offered and identified was thereupon marked 'U. S. Exhibit Number 1.')

Mr. Lawson: (Reading the document to the jury.)"

XIX.

The court erred in refusing to instruct the jury, as requested by plaintiff in error, as follows, to-wit:

"You are instructed that you cannot presume, conjecture, guess or arrive at any conclusion as to the age of the plaintiff in error Edward H. Phelan from the mere fact that he was baptized on the 8th day of August, 1886." [Tr. p. 129.]

To which refusal of the court the plaintiff in error duly excepted.

XX.

The court erred in refusing to instruct the jury, as requested by plaintiff in error, as follows, to-wit:

"You are instructed that on June 4th, 1886, and at the time Thomas Phelan executed the declaration of homestead on the property near Whittier, where he was then residing, the law of the state of California did not require that he insert in such declaration of homestead the names of his children, the number of his children, or the ages of his children."

To which refusal of the court the plaintiff in error duly excepted.

XXI.

The court erred in refusing to instruct the jury, as requested by plaintiff in error, as follows, to-wit:

"You are instructed that the law of the state of California has at no time required one declaring a homestead on property to insert in the declaration of homestead the names, ages or number of his children, or the dates of their birth."

To which refusal of the court the plaintiff in error duly excepted.

XXII.

The court erred in refusing to instruct the jury, as requested by plaintiff in error, as follows, to-wit:

"The court instructs the jury that the law did not require a declaration of homestead to set forth the number of children, or their ages, possessed by the party making such declaration of homestead."

To which refusal of the court the plaintiff in error duly excepted.

XXIII.

The court erred in refusing to instruct the jury as requested by plaintiff in error, as follows, to-wit:

"You are instructed to return a verdict acquitting the plaintiff in error."

To which refusal of the court the plaintiff in error duly excepted. No evidence whatever was adduced to prove a charge in the indictment, to-wit:

"He the said Edward H. Phelan, then and there not being an officer or an enlisted man of the regular army, or the navy, or the Marine Corps, or of the National Guard, or of the Naval Militia in the service of the United States, or an officer in the Reserve Corps or an enlisted man in the Enlisted Reserve Corps in active service." [Tr. top of p. 7.]

XXIV.

The court erred in overruling and denying plaintiff in error's motion for a new trial, to which action of

the court plaintiff in error then and there duly excepted. [Tr. pp. 146 and 151.]

XXV.

The court erred in making, giving and rendering judgment against the plaintiff in error on the indictment herein for the reason that the verdict of the jury is against the law, in that the evidence failed to show that the plaintiff in error was guilty of the crime charged in the indictment, or any crime whatsoever.

XXVI.

The court erred in making, giving and rendering judgment against the plaintiff in error on the indictment herein, for the reason that the evidence conclusively shows that the plaintiff in error was over thirty-one years of age on June 5th, 1917, and also in that it was not proven on the trial of said action that the plaintiff in error was not then and there an officer or an enlisted man in the regular army, or the navy, or the Marine Corps, or the National Guard, or the Naval Militia in the service of the United States, or an officer in the Reserve Corps, or an enlisted man in the Enlisted Reserve Corps in act of service.

BRIEF OF THE ARGUMENT.

I.

With Reference to Aforesaid Specifications of Error Numbered Respectively I, II, III, IV and V, Occurring in Testimony of Government Witness, Father Patrick Harnett, We Respectfully Submit That in Each of the Errors Hereinbefore Specified the Action of the Court in Overruling the Objections of Plaintiff in Error Was Highly Prejudicial.

Under the decisions said Harnett, who baptized Phelan, having no personal knowledge regarding the date of his birth, could not testify as to date of birth, neither could that part of the baptismal record reciting the date of birth be introduced because the record is as to such date of birth merely hearsay.

Berry v. Hull, 6 N. M. 643, 30 Pac. 936;
Durfee v. Abbott, 61 Mich. 471, 28 N. S. 521;
Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. 541;
1 Greenleaf on Evidence, paragraph 493;
Chambers v. Chambers, 32 N. Y. Supp. 875;
Clark v. Trinity Church, 5 Watts 266;
Sitler v. Gehr, 105 Pa. 577, 51 Am. Rep. 207;
Kabok v. Phoenix Mutual Life Ins. Co., 51 Hun. 639, 4 N. Y. Supp. 718.

The Government, having called Father Harnett to produce the book of baptisms for the year 1886, and having proven that he had baptized Phelan, and having shown that the baptismal record contained not only

the date of baptism, *but a statement as to the date of birth of the child,* it was undoubtedly impressed upon the jury that the date of birth so recorded was some date other than March 13th, 1886, as contended for by plaintiff in error, and that counsel for plaintiff in error were fearful of allowing such record to be read in evidence.

Then again, it was immaterial to the issue in this case when Phelan was baptized. It was conceded by the Government that Phelan was already in existence on August 8, 1886, the date of baptism, because the Government contended that he had been born July 13th, 1886, but the Government counsel, knowing a Michael Duffy was a member of the jury [Tr. p. 11], and, we presume, assuming that the name Duffy, being of Irish origin, was likely to be borne by a man who was a Catholic and that probably other members of the jury were Catholic, that the proof of the date of baptism by the baptizing priest himself would result in the jury more readily coming to the conclusion that the date of birth of July 13th, contended for by the Government, was more probably the date of birth than March 13th, because being nearest to the date of baptism on August 8th.

Baptismal Certificate.

A statement as to a child's age in the certificate or register of his baptism is alone no proof of the date of his birth.

Houlton v. Manteuffel, 53 N. W. 541.

Baptismal registers or certificates are admissible to show the fact and date of baptism, but not to prove other facts, for example, the date of the birth of a child, except that he was born before the baptism.

Durfee v. Abbott, 61 Mich. 471, 28 N. W. 521;
Berry v. Hull, 6 New Mexico 643, 30 Pac. 936;
Kabok v. Phoenix Mutual Life Insurance Co., 4 N. Y. Supp. 718;
Jacoby v. Germania Order, 26 N. Y. 318;
Herman v. Mason, 37 Wis. 273.

It must be remarked here that notwithstanding the fact that the age of the defendant was the issue involved here, this does *not* make the question, as far as evidence is concerned, *one of pedigree,* so as to bring the case within the rule allowing in certain instances hearsay testimony of matters of pedigree.

A statement as to a child's age in the certificate or register of his baptism is, alone, no proof of the date of his birth.

Houlton v. Manteuffel *et al.* (Minn. Oct. 29, 1892), 53 N. W. Rep. 541.

Assuming that the certificate of defendant's baptism, "issued by his church," would have been admissible as an official entry or registry to prove the fact and date of his baptism, it was not competent to prove his age or the date of his birth. An official entry or registry must speak only to that which it was the duty or business of the official to do, and not of extraneous facts which did not occur in his presence; consequently, the

mention of a child's age in the registry of christenings is alone no proof of the date of his birth.

1 Greenleaf on Evidence, Para. 493;
Burghart v. Angerstein, 6 Car. & P. 690;
Rex v. Clapham, 4 Car. & P. 29;
Wihen v. Law, 3 Starkie 63.

The certificate was properly excluded.

Unless acknowledged as documents of an authentic and public nature, by the laws of the state where kept, church registers are not admissible in evidence, except by special statute.

Childress v. Cutter, 16 Mo. 24.

An entry in a parish register of a child's baptism is not evidence of the identity of such child, nor is the recital in such entry of the child's age sufficient evidence thereof to support a plea of infancy.

Morrissey v. Wiggins Ferry Co., 47 Mo. 521;

The certificate of a priest who baptized a person is incompetent to prove the age of such person.

Berry v. Hull, 6 N. M. 643, 30 Pac. 936.

A record of baptism, containing a statement of the time of the birth of the person referred to in it, but none of the day on which the baptism itself took place, can only be relied on as evidence of the date of the baptism, and not of the date of the birth.

Kabok v. Phoenix Mutl. Life Ins. Co., 51 Hun. 639, 4 N. Y. Supp. 718.

A church register is not admissible as evidence of the facts therein recited, as it is not a book required to be kept by law.

Chambers v. Chambers (Sup.), 32 N. Y. Supp. 875, 24 Civ. Proc. R. 187.

A church record of births, deaths, and burials is not competent to prove births.

Sitler v. Gehr, 105 Pa. St. 577, 51 Am. Rep. 207.

A record of baptism, when admissible in evidence, is evidence of the date of baptism, but not of birth, though stated therein.

Durfee v. Abbott, 61 Mich. 471, 28 N. W. 521.

A record of a baptism made by a minister of a parish is admissible evidence of the fact of baptism.

Huntly v. Compstock, 2 Root 99.

Where the entry of a baptism in a church register states the date of the birth of the baptized person, it is not evidence of such date to prove infancy, where that is an issue.

Herman v. Mason, 37 Wis. 273.

Pedigree.

Not involved. Although the age of a female child was involved in the issue to be tried, that fact did not constitute it a case of pedigree in which her age could be proven by the written declaration of a third person.

Evidence in case of pedigree. In cases of pedigree it must be shown that the person who made the entry is dead before the evidence will be admissible.

People v. Mayne, 118 Cal. 516, 62 Am. St. Rep. 256.

"Although the term 'pedigree' includes the facts of birth, marriage, and death, and the times when these events happened (Greenleaf on Evidence, Sec. 104), and evidence of these facts is pertinent for the purpose of establishing pedigree, the several facts, or either of them, do not of themselves constitute pedigree, and a case in which the age of an individual is the issue to be determined is not a case of pedigree. 'A case is not necessarily a case of pedigree because it may involve questions of birth, parentage, age, or relationship. Where these questions are merely incidental and the judgment will simply establish a debt or a person's liability on a contract, or his proper settlement as a pauper, and things of that nature, the case is not one of pedigree, although questions of marriage, legitimacy, death, or birth, are incidentally inquired of.' (Eisenlord v. Clum, 126 N. Y. 566. See, also, Haines v. Guthrie, L. R. 13 Q. B. Div. 818.) In Leggett v. Boyd, *supra,* the defense of infancy was made to an action upon a promissory note, and in support of this defense the family Bible of the parents was offered in which the entry of his birth had been made by his mother; and its exclusion was upheld upon the ground that the person by whom it was made was in court and could have been examined. Campbell v. Wilson, *supra,* was of the same character, and the evidence was excluded because

it was shown that the mother was within reach of the process of the court. Greenleaf v. Dubuque etc. R. R. Co., *supra,* was an action to recover damages for negligence in causing the death of a person, and, for the purpose of establishing his age as an element in determining the amount of damages, the plaintiff was allowed to show the date of his birth from an entry in the family Bible. This was held to be error, on the ground that it was not shown that the person who made the entry was dead. In Robinson v. Blakely, 4 Rich. 586, 55 Am. Dec. 703, the family register of births and deaths was held inadmissible to show the age of the plaintiff for the purpose of determining whether the action was barred by the statute of limitations, upon the ground that the father who made the entry was still alive, the court saying: 'These entries stand on no higher footing than other declarations, and are entitled to no higher consideration, except that if made at the time the fact occurred they are more reliable.' The admissibility in evidence of these facts is limited by Mr. Greenleaf in the action above referred to, to cases where they arise incidentally and in relation to pedigree as follows: 'Thus an entry by a deceased parent, or other relative, made in a Bible, family missal, or any other book, or in any document or paper, stating the fact or date of the birth, marriage, or death of a child or other relative, is regarded as the declaration of such parent or relative in a matter of pedigree.' Taylor says (Taylor on Evidence, 650): 'Entries made by a parent or relation in Bibles, prayer-books, missals, almanacs, or, indeed, in any other book,

or in any document or paper, stating of a child or other relation, are also evidence in pedigree cases as being written declarations of the deceased persons who respectively made them.'

"The entry in the Bible in the present case was shown to have been made by Mrs. Shipton, and, as she was present in court and had testified to the date of the child's birth, it was not competent for the prosecution to introduce as a piece of substantive evidence in support of this issue her written declaration made several years previously. Nor can it be said that the error was harmless. The evidence was not cumulative, but was of an entirely different character from any other evidence in reference to the child's age, and the jury may well have given it a credit by reason of its formality and apparent authenticity which they would not grant to the living witness who testified respecting the age."

People v. Mayne, 118 Cal. 520.

Then again, it was impossible to present to the jury the doctrine of the Catholic church with reference to the salvation of infants who die without baptism, without at the same time proving that the parents of the child were aware of that doctrine, and even though they may have been aware of the doctrine it is a frequent occurrence that even Catholics do not promptly cause their children to be baptized very soon after birth. This is due to mere negligence or inattention, and then again, by reason of the absence of an available priest or by reason of the inability of Catholic parents to

have a child baptized soon after birth owing to illness, or other detaining causes.

II.

Government Exhibits Nos. 3 and 4, Purporting to Be Photostat Copies of Alleged Affidavits and Pension Applications Made by Mary Phelan, Were Erroneously Admitted in Evidence.

With reference to aforesaid specifications of errors numbered VI, VII and VIII, respectively, we strenuously insist that the court below in each case committed grave error prejudicial to plaintiff in error Phelan. The admission in evidence on the cross-examination of witness Mary Phelan, mother of plaintiff in error, of U. S. Exhibits numbers 3 and 4 is inexcusable. Each of these two exhibits appear to be photostat copies of some original documents apparently claimed to have been signed by the witness Mary Phelan, and neither of which original documents was produced in court, nor was the absence of any of such original documents properly accounted for, nor was Mrs. Phelan ever asked specifically if she had ever made or set forth in her pension applications, specifically describing them, any statement as to the date of the birth of her son, Edward Henry Phelan, plaintiff in error, nor was it proven in any way that Mrs. Phelan had ever signed any of the original documents of which Exhibits 3 and 4 purported to be photostat copies. Each of said Exhibits 3 and 4 was in turn presented to her and she was asked if she had signed either of said documents. She answered that she could not say whether a signature or signatures thereon were hers or not. The questions

in themselves were impossible questions, because the exhibits themselves show that they were photostats and contained no original signatures of Mary Phelan. With the exception of the certificate annexed to each of said exhibits there was nothing in either exhibit except a photographic reproduction of other documents. These documents were introduced in evidence to discredit the testimony of Mary Phelan or to impeach her testimony. It was certainly an easy matter for the Government to have secured the production of the original documents. The Government absolutely controlled the setting of the case for trial. The Government could easily have secured a continuance of the trial for the purpose of securing the originals. This trial was the second trial of the case. When Government counsel was interrogating Mrs. Phelan with respect to Exhibit No. 4, the court itself indicated to Government counsel a line of questioning, when the court made the following statement [Tr. p. 114]: "Well, you may ask her if it is a photographic copy of her handwriting." But Government counsel, even after the court made the suggestion set forth above, did not pursue that method of questioning. There is nothing in the record to prove that the witness Mary Phelan ever signed any of those originals from which the said photostat copies were produced.

As set forth in specification of error No. VIII, Government counsel attempted to show that the entries of the births of the children of the witness were in her own handwriting, but also failing in such attempt. No witness could truthfully testify that any handwriting

appearing in the photostat copies was his or her handwriting. Of course, they could say, if true, that the handwriting appearing in the photostat copies was a photographic reproduction of their own handwriting. Not only was objection made by counsel for plaintiff in error on the introduction of each of said exhibits upon the ground that each was incompetent, irrelevant and immaterial, but also upon the further ground that no proper or sufficient foundation had been laid therefor. Subsequent to the introduction in evidence thereof, and the reading of each of said exhibits to the jury, an attempt was made by counsel for the Government to supply the foundation for the introduction of each of said exhibits by putting on the stand Miss Claya Taylor, a stenographer in the office of the United States Attorney at Los Angeles, and causing her to identify a telegram that it was claimed had been sent by the United States attorney to the attorney general requesting the transmission of the original papers, "proving age and date of birth of Edward Phelan in pension application of Mary Phelan," and also in introducing the evidence of a letter purporting to have been sent to the assistant United States attorney at Los Angeles under date of October 10, 1917, by A. B. Bielaski, who at the time appeared to be chief of Bureau of Investigation in the Department of Justice, in other words, chief detective, and in which letter there appeared Bielaski's statement and conclusion that "The commissioner of pensions considered it impracticable to send the original papers. I believe, however, that the certified copies will serve your purpose equally well." For

some reason or other, the court below conceived the erroneous idea, notwithstanding the heading of the letter itself, "Department of Justice, Bureau of Investigation" [Tr. p. 118], that Bielaski, the writer of the letter, was the chief of the pension department, and that his superior officer, of course, was the commissioner of pensions. That Bielaski was the man who should have charge of these things and send them out, but that he should do it only with permission of his chief or senior officer. [Tr. p. 119.]

Although counsel for plaintiff in error made a special request of the court in the following language [Tr. top of p. 119]: "Before any questions are put, Your Honor, I wish you would personally read this letter." (Referring to the Bielaski letter.) The court understood what letter was referred to by counsel of plaintiff in error, because the court replied in the following language: "That is the one just admitted?" Thereupon counsel for plaintiff in error replied, "Yes. The statements therein contained are hearsay, Your Honor. That is not a statement of the commissioner of patents." Meaning, of course, as subsequently corrected, commissioner of pensions. [Tr. p. 119.] As heretofore clearly shown, Exhibits No. 3 and No. 4 contained statements to the effect that the plaintiff in error was born July 13th, 1886.

There Is No Proper Foundation Laid for the Introduction of the Government's Exhibits 3 and 4.

First: It was not proved that any of the originals, of which these documents purported to be copies, had

been executed, or that Mary Phelan, the witness, had signed any of the originals, nor was the witness asked if she had made any of the statements contained in the said documents.

Second: It was not shown that the original documents could not have been produced or that they were lost.

Third: The copies that were introduced in evidence were not produced from the proper custody.

These documents were *secondary evidence.* Secondary evidence is defined as follows: "Secondary evidence is that which is inferior to primary. Thus a copy of an instrument or oral evidence of its contents is secondary evidence of the instrument and contents." (Cal. C. C. P., section 1830.) Copies of documents certified and in Rev. Stat., Sec. 882, are secondary evidence.

Newsome v. Langford, 174 S. W. 1036.

Proof of the existence of the original instruments must be made before secondary evidence of the instruments or their contents is admissible.

Smith v. Brannan, 13 Cal. 107;
Reynolds v. Lincoln, 71 Cal. 183;
Ford v. Cunningham, 87 Cal. 209, Cyc. 536;
Pepper v. James (Ga.), 67 S. E. 218;
Durbrow v. Hackensack Meadows Company (N. J.), Atl 59;
Columbia County Bank v. Emerson (Ark.), 143 S. W. 852.

"The deed from Sutter to Brannan was not properly recorded. It is scarcely pretended that it was * * *

It seems from the copy produced that there were subscribing witnesses to the deed. They were not called. The original itself was not produced. Brannan testifies to its loss, but if his testimony was sufficient to let in secondary evidence of the contents (which is by no means clear) the record fails to show any legal evidence of the contents of the deed. The subscribing witnesses were not shown to be without the jurisdiction of the court and their testimony should have been had *at least to the fact of the execution of the paper.*"

Smith v. Brannan, *supra.*

In Reynolds v. Lincoln, *supra,* the action is one brought to quiet title to certain real estate. At the trial the defendant offered in evidence a copy of the article of association of the Sutter Land Company, under whom he claimed. This evidence was excluded and the Supreme Court of California, in commenting upon the exclusion, says:

"We see no error in excluding the paper purporting to be a copy of the articles of association of the Sutter Land Company. *There was no proof that the original of such articles ever existed.*"

Reynolds v. Lincoln, *supra.*

Before a party can be permitted to introduce secondary evidence of the contents of a written contract, deed or other instrument, stated to have been lost or destroyed, satisfactory proof must first be made *of the former existence, proper execution* and genuineness of the instrument.

17 Cyc. 536.

"The offer (to prove terms and provisions of a certain written contract) was made without previous proof of the instrument and due execution of the contract. The non-production under demand of a contract, the existence of which was denied, will not justify proof of its contents by secondary evidence without *first proving its existence,* and due execution."

Durbrow v. Hackensack Meadow Co., *supra.*

"To justify the admission of secondary evidence as to the contents of a lost deed or a deed without the jurisdiction of the court, not only the existence of the deed must be shown, but it must be shown to have been properly executed."

Pepper v. James, 67 S. E. 218. Citing Calhoun v. Calhoun, 6 S. E. 913.)

And further quoting from the Calhoun case, the opinion in Pepper v. James, *supra,* continues:

"We think the proper rule of law in regard to the admissibility of secondary evidence is not only that the plaintiff must show the existence of the deed, but that he must show that it was properly executed."

"To introduce a copy of an instrument or to give evidence of its contents, the party should lay foundation by *some evidence tending to prove that there was a genuine instrument in existence.* The register of policies of insurance kept by the insurance company is nothing more than a private memorandum which ought to have been produced *after proving the existence of an original."*

U. S. v. The Paul Shearman, 27 Fed. Cases No. 16012.

No showing was made justifying the introduction in evidence of Government's Exhibits 3 and 4, being photostat copies of pension application and affidavits made by Mary Phelan.

As shown above, these exhibits were secondary evidence and no proof of any cause was made as to the loss, destruction or inaccessibility of the original documents, nor was any showing made as to why the originals were not produced, though presumably, from the nature of the documents, they were in the possession of the Government and were actually shown to be in the possession of the Government by the letter of the chief of the Bureau of Investigation of the Department of Justice.

"The burden of proving the facts essential to a proper foundation for the admission of secondary evidence, such as the loss, destruction or inaccessibility of an original instrument rests, of course, on the party seeking to produce the evidence."

17 Cyc. 539.

Where a party seeks to introduce secondary evidence of the contents of documents, and as a foundation for the introduction of such evidence relies upon the fact that the original writings have been lost or destroyed or are inaccessible to him, he must first establish this fact by sufficient and satisfactory evidence.

17 Cyc. 538.

"No proof of loss of any of these letters was made and of any search for them, nor was any attempt made to account for their non-production. The admission of

this evidence was palpably error. The witness is asked both by court and counsel to testify to the contents of letters without any foundation by proof of loss for the introduction of such secondary evidence."

Byrne v. Byrne, 113 Cal. 294, 299.

"There can be no evidence of a writing other than the writing itself except in the following cases:

"1. When the original has been lost or destroyed, in which case proof of the loss or destruction must first be made.

"2. When the original is in the possession of the party against whom the evidence is given, and he fails to produce it after reasonable notice.

"3. When the original is a record or other document in the custody of a public officer.

"4. When the original has been recorded and the alleged copy of the record is made evidence by this code or other statute.

"5. When the original consists of numerous accounts or other documents. * * * In the cases mentioned in subdivisions 3 and 4 a copy of the original or of the record must be produced. In those mentioned in subdivisions 1 and 2 either a copy or oral evidence of the contents."

Cal. C. C. P., Sec. 1855.

The only one of the above classifications applicable to the documents in question is No. 3, and, as we have heretofore stated, these documents were not records in the custody of a public officer such as were contemplated by the section above cited or by section 882 of the U. S. Rev. Stat.

The Documents Were Not Produced From the Proper Custody.

Government Exhibit 6 [Tr. p. 118], being the letter transmitting the documents admitted in evidence as Government's Exhibits 3 and 4, shows that these exhibits did not come from the custody of the proper department of the Government. They were forwarded by the chief of the Burean of the Investigations of the Department of Justice, with a statement in the letter transmitting them that "the commissioner of pensions considered it impracticable to send the original papers." We know of no statute or other authority empowering the chief investigator of the Department of Justice to have the custody and control over any documents, papers or records of the Pension Bureau, which rightfully belong in the custody of the Department of the Interior. The statutes providing for the admission under certain circumstances of official documents assume and expressly provide that the same should be forthcoming from the legal custodian.

Cal. C. C. P., Section 1918, Subdivision 9;
Cal. C. C. P., 1919.

In addition to the reasons above given, no proper foundation was laid for the introduction of these Exhibits 3 and 4, because:

(a) The certificate attached to the copies introduced in evidence was not made by the proper officer.

(b) The certificate was not made in proper form.

(c) The certificate was not made under seal.

(d) The exhibits in question were not such records, copies of which the statute contemplates may be introduced in evidence.

United States Rev. Stat., Sec. 882, 3 Fed. Stat. Annotated, page 26, provides:

"Copies of any books, records, papers or documents in any of the executive departments authenticated under the seal of such departments respectively shall be admitted in evidence equally with the original thereof."

The Pension Bureau is a bureau forming part of the executive Department of the Interior. This record should have been certified by and under the seal of the Department of the Interior. Section 882, above quoted, does not empower the commissioners of the various bureaus to authenticate documents. It provides and contemplates that such authentication shall be made by the executive head of the department and under his seal. In only two cases, to-wit, that of the land office and the patent office, are the commissioners of such offices empowered to make such authentication. This power was expressly conferred on these commissioners by U. S. Rev. Stat., Sec. 891 and 892, and the adoption of these sections clearly shows that the provisions of section 882 did not empower commissioners of bureaus forming part of an executive department to make these authentications; and the express authorization granting specifically to the commissioners of the land and patent offices necessarily excludes from

the exercise of such powers all other commissioners, including the commissioner of pensions.

U.. Rev. Stat., Sec. 882, 891, 892.

The certificate in case of the exhibits under discussion is found as to Exhibit 3 at transcript, page 102, and as to Exhibit 4 at transcript, page 112. These certificates are identical in form, and we quote the first, attached to Exhibit 3:

"Department of the Interior
Pension Department
Washington, D. C.
October 10, 1917.

I, G. M. Saltzgaber, commissioner of pensions and custodian of the records of the Bureau of Pensions, do hereby certify that the attached seven pages are true photostat copies of a deposition made by Mary Phelan, November 10, 1909, in connection with her claim for pension as widow of Thomas Phelan, Co. F 12 Vt. Mil. Inf., since allowed by certificate No. 697667 before F. W. Tuckerman, then duly qualified as a special examiner of the Bureau of Pensions.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Pension Bureau to be affixed the day and year above written.

G. M. Satlzgaber,
Commissioner of Pensions."

To be in the proper form in addition to the certificate of the commissioner of pensions there should have been a certificate from the secretary of the interior.

Ballew v. United States, 160 U. S. 187.

The exhibits in question are not such records, copies of which the statute contemplates authenticated and introduced in evidence.

These affidavits, alleged to have been made by Mary Phelan in applying for a pension, were not such books, records, papers or documents as were contemplated by the statute. The words "documents" and "papers" cannot be held to mean every document or paper on file, but *only such as were made by an officer or agent of the Government* in the course of his official duty.

Block's case, 7 C. T. L. 406.

The Certificate Does Not Bear the Seal of the Department of the Interior.

The certificate of the commissioner of pensions, attached to the document in question and which appears in the transcript at page 102 and page 112, does not bear the seal of the Department of the Interior. Even if these papers were otherwise properly admissible, they are not original, but secondary, evidence, and the authentication should conform strictly to the statute and the seal is a necessary and constituent part of the authentication.

Newsom v. Langford (Tex.), 174 S. W. 1036.

"The principal contention of appellant is that the document lacks an official seal. That the enrollment record, indicated in the Congress Act, being conclusive evidence of the age of Freedmen is a new rule of evidence, and that a party seeking the advantage of said statute should be held to the strict compliance

with the statutory rule of evidence * * * and that as to certified copies we are remitted to either section 882 of the Federal Statutes or to section 3 of the Act of Congress of July 26, 1892. * * * We think the contention of appellant is justified and that the court erred in admitting the particular document in evidence. We are not referred to any statute, except the general statutes mentioned relative to the introduction of certified copies as evidence which would vitalize a purported copy and elevate it to the dignity of original testimony. Without proper authentication, unless there is some statute that would make a copy without more under the purported signature of the commissioner to the Five Civilized Tribes permissible evidence equal to the original record, we are unable to understand how the same could rise to the dignity of original testimony. The seal in this instance which every statute would apply forms a part of the authentication."

Newsom v. Langford, *supra.*

The Act of August 24, 1912, 37 Stat. at Large, p. 498, Suppl. Fed. Stat. Ann. 1914, p. 1975, referred to by the chief of the Bureau of Investigation [Tr. p. 118] is "an act to make uniform changes for copies of record of the Department of the Interior and of its several bureaus," and if it is applicable at all does not serve to remove any of the objections above pointed out. It reads in part as follows:

"That the secretary of the interior, the head of any bureau, office or institution, or any officer of the department, may, when not prejudicial to the interests of the Government, furnish authenticated or unauthen-

ticated copies of any official books, records, papers, documents, maps, plates, or diagrams within his custody and charge therefor the following fees * * *."

It will be noticed that while under this statute the heads of bureaus are authorized to furnish authenticated or *unauthenticated* copies, such heads of bureaus are nowhere authorized to authenticate the copies furnished, and section 4 of the same act makes it obligatory to attest the authentication by the use of an official seal.

No Evidence Laid for Impeachment of Mary Phelan.

The evidence contained in Government's Exhibits 3 and 4, being the affidavits and applications of Mary Phelan, was presumably introduced by the Government for the purpose of impeaching her testimony as to the date of the birth of defendant, these exhibits containing statements to the effect that the defendant was born on July 13th, 1886, instead of March 13th, 1886, as testified to by witness. No foundation whatever was laid for such impeaching testimony.

"A witness may also be impeached by evidence that he has made at other times statements inconsistent with his present testimony, but before this can be done, the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the

witness before any question is put to him concerning them."

Cal. C. C. P., Sec. 2052.

The statements alleged to have been made by Mrs. Phelan were not related to her, nor was the time and place of making such statements shown to her, nor was she asked whether she had made such statements, and *she was not shown the original writing claimed to have been made* by her. As above stated, she was shown what purported to be a photographic copy of the alleged writing, and asked if this was her writing. Obviously such testimony did not lay a foundation for an impeachment.

People v. Chang, 74 Cal. 389;
People v. Lee Chuck, 78 Cal. 317;
People v. Nonello, 99 Cal. 333.

III.

Aforesaid specifications, numbered XV and XVI refer to the admission in evidence of U. S. Exhibit No. 5, being a carbon copy of a telegram purporting to have been sent to the attorney general at Washington by O'Connor and reading as follows:

"Send to Special Examiner Uline, Los Angeles, *original papers proving age and birth Edward Phelan in pension application by Mary Phelan* include any other evidence in pension files papers identified telegram October 9th from Saltgiber trial October sixteenth. Rush O'Connor U. S. Atty." [Tr. p. 117.]

As heretofore stated, there was no justification for the admission in evidence of said carbon copy of said

telegram, and its admission in evidence was prejudicial to plaintiff in error. It is to be noted that said telegram requested the attorney general to send *"the original papers proving age and birth"* of Edward Phelan, and undoubtedly the jury concluded that the age or birth of Edward Phelan, set out in aforesaid photostat copies, U. S. Exhibits No. 3 and No. 4, in themselves proved the age or birth of Edward Phelan, irrespective of the testimony of Edward Phelan, and the testimony of Mary Phelan, his mother, and the testimony of Mrs. Martinez, the only other living person present at Phelan's birth.

The Government introduced no supplementary testimony whatever, which in or by itself proved the birthday of Edward Phelan, plaintiff in error, notwithstanding the promises of counsel for the Government in his opening statement to the effect that the Government would show "that before July 13th, 1886, those people who were in a position to know, acted upon the belief—and they had good grounds for believing—that the plaintiff in error was not in existence, and that his mother and father and his brothers and his sisters and his friends, who knew him, all believed and acted upon the belief that plaintiff in error was born July 13th, 1886."

IV.

Aforesaid specification of error XVII refers to the admission in evidence of U. S. Exhibit No. 6, which consisted of a letter addressed by A. B. Bielaski of the Bureau of Investigation in the Department of

Justice to the assistant United States attorney at Los Angeles, written under date of October 10, 1917, and which U. S. Exhibit No. 6 is in words and figures following, to-wit [Tr. p. 118]:

"Department of Justice. R.L.D.-L.P.
Bureau of Investigation
Washington, October 10-1917.

John R. O'Connor, Esquire, assistant United States attorney, Los Angeles, California.

Dear Sir:

Referring to your telegram to me of today, I enclose herewith copy of the baptismal and death records of the Cathedral of St. Vibiana, relative to the baptism of Edward Henry Phelan, copy of a deposition made by Mary Phelan on November 10, 1909, in connection with her claim for pension as widow of Thomas Phelan, and copy of three applications for pension made October 12, 1889, August 15, 1890, and May 12, 1908, by Mary Phelan, certified under the Act of August 24, 1912, 37 Statutes at Large, page 498, section 3.

The commissioner of pensions considered it impracticable to send the original papers. I believe, however, that the certified copies will serve your purpose equally well.

Very truly yours,
A. B. Bielaski, *Chief.*"

(Enclosures) B.L.D.

Under aforesaid specification XVII, and also in paragraph II hereof, we criticized the admission in evidence of U. S. Exhibit No. 6. It is unnecessary to repeat that criticism. We respectfully urge that the admission in

evidence of the Bielaski letter, objected to as it was by counsel for plaintiff in error, who noted an exception to the action of the court in overruling such objection, was inexcusable error.

Government Exhibits 5 and 6 were presumably introduced to supply the lack of foundation for the introduction of Exhibits 3 and 4; but neither the telegram from the U. S. Attorney at Los Angeles to the Attorney General at Washington [Exhibit 5, Tr. p. 117], nor the letter in reply from the chief of the bureau of investigation of the department of justice [Exhibit 6, Tr. p. 118], proved either the *existence* or the *execution* of the original documents, or that the originals could not be produced, nor did their introduction remedy any of the defects in the authentication of the copies above pointed out. These exhibits, however, did show that the exhibits 3 and 4 were not produced from the proper custody; the department of justice is not the custodian of the records of the Pension Bureau. Neither did Exhibits 5 and 6 or either of them in any manner make good the failure of the Government to properly lay the foundation for the impeachment of Mary Phelan, which has been noticed above. Of course these exhibits for any purpose other than those above indicated were absolutely incompetent as evidence, being the purest hearsay.

V.

Aforesaid specification of error No. XVIII deals with the introduction in evidence of U. S. Exhibit No. 1, which purported to be Phelan's application for mem-

bership in the Knights of Columbus, and in which application, dated June 14th, 1909, it was set forth that Phelan was born the 13th day of July, 1886. [Tr. p. 47.]

When said application was offered in evidence counsel for plaintiff in error objected to it upon the ground that it was incompetent, irrelevant and immaterial and no sufficient foundation had been shown therefor, which objection was overruled by the court, counsel for plaintiff in error noting an exception. Thereupon said exhibit was introduced in evidence as U. S. Exhibit No. 1, and counsel for the Government proceeded to read said exhibit to the jury, and when Government counsel was in the midst of such reading [Tr. p. 46] the court suggested to Mr. Lawson, counsel for the Government, that he thought probably he ought to prove the signature on the document, inasmuch as counsel for plaintiff in error had objected to its accuracy, stating that simply because the paper bore Phelan's name did not prove its authenticity.

Thereupon the witness Rechsteiner [Tr. p. 46] testified that he had attended the first trial and heard a part of the plaintiff in error's testimony, and that he heard the middle of his testimony regarding the signing of the application. Thereupon counsel for the Government asked the witness this question: "Do you remember whether or not he stated at the time he signed this application?" To which witness replied: "Yes," also "he admitted signing it."

The California Code provides that the handwriting of a witness may be proven as follows:

1. By anyone who saw the writing executed.
2. By evidence of the genuineness of the handwriting of the maker.
3. By a subscribing witness.

California Code Civil Procedure, Sec. 1940.

VI.

Aforesaid specification of error XI relates to the court's action in sustaining the objection of counsel for the Government to the question put by counsel for plaintiff in error to the Government witness, Frank Daven, to this effect: "Did he (referring to Edward Phelan) ever do anything to you to make you feel unkindly to him?" [Tr. p. 67.]

We certainly insist that the action of the court below in sustaining such objection, to which plaintiff in error duly noted an exception, was clearly error. Frank Daven, said Government witness, had testified to a conversation which he claimed had taken place on the first Sunday in May, 1917, to-wit, May 6, 1917, at his home on the Phelan ranch in the presence of his wife and daughter, and in which conversation witness Daven claimed that plaintiff in error had said in effect that he never had to register, that he did not want to get killed going to fight for France and England, and that he would let his whiskers grow and get away up in the mountains, in Nevada some place, and that the board could not find him. It was certainly proper for plaintiff in error to elicit hostility or bias or prejudice against him on the part of said Frank Daven, and, as

we contend, the question was not only proper, but a material one.

VII.

Aforesaid specification of error XII deals with the error of the court in refusing to allow plaintiff in error Edward Henry Phelan, upon the objections of counsel for the Government, to testify and give evidence tending to show that the relations between him and the witness Mrs. Daven were unfriendly, and to which action of the court plaintiff in error duly excepted. [Tr. p. 181.]

The court held that evidence tending to show unfriendly relations between Mrs. Daven and plaintiff in error was immaterial. We earnestly contend that it was indeed very material so far as plaintiff in error was concerned, to show that Mrs. Daven entertained a hostile and unfriendly feeling toward him, because when such unfriendliness or hostility would be disclosed to a fair jury less weight would be assigned to Mrs. Daven's testimony than if the case were otherwise. It will be recalled that Mrs. Daven testified on behalf of the Government to the effect that on the first Sunday in May, to-wit, May 6th, 1917, plaintiff in error had stated that he would not register because he was not going to be killed for any other nation, and he would let his whiskers grow and go out in the mountains, either in Arizona or Nevada. [Tr. p. 49.]

The court's attention is again called to the certainty of the Government witnesses Susie Daven and her husband, Frank Daven, as to this conversation on

the part of Phelan occurring on May 6, 1917, when, as a matter of fact, the conscription law was not enacted by Congress until May 18, 1917. While there may have been discussions in the press regarding the pendency of the measure, it was not known for certain what the limits of the ages of the draft would be until almost the very last day of the session. The Senate had one idea upon the subject and the House another, and it was not until a conference of the committees of each house was held that the age limits were fixed, and in no event was it known on May 6th, 1917, that such a thing as an exemption board would be called into existence. The exemption boards were provided for by the President's proclamation and which was not issued until May 18, 1917, and the details of the matter of conscription were not known until the rules and regulations provided for by the President were made under his direction, and this was after May 18, 1917.

It will be recalled that Frank Daven testified [Tr. top of p. 162], among other things, that Phelan stated that he would let his whiskers grow and get away up in the mountains, up in Nevada some place, *"and the board could not find him."* Obviously Daven was romancing when he made the reference to the *board,* and certainly with such witnesses as Susie and Frank Daven, it was of the greatest importance, so far as plaintiff in error was concerned, to show that there was hostility, bias or animosity.

VIII.

Aforesaid specification of error XIII deals with the court's refusal to allow plaintiff in error, upon the objection of counsel for the Government, to answer a question put to him by his counsel for the purpose of showing that for years a brother, John Joseph Phelan, had mistakenly regarded and observed July 22 as his birthday, when as a matter of fact, years after it was discovered or ascertained that June 22 was his true birthday. [Tr. p. 83.]

We respectfully urge that such error was prejudicial to plaintiff in error herein. It seems to us that where such a mistake occurs in the same family, it is proper evidence to show that it was neither absurd or unreasonable or out of the ordinary that for a considerable period in the life of plaintiff in error he regarded July 13th, 1886, as a birthday, his mistake was no more unnatural or extraordinary than a similar mistake as to date of birth entertained by a brother.

IX.

Aforesaid specification XIV deals with the court's refusal to allow Mary Phelan, the mother of plaintiff in error, upon objection of counsel for the Government, to testify regarding her other son, John Joseph Phelan, mistakenly observing for a number of years a date in a wrong month as his birthday. [Tr. p. 85.]

We earnestly urge that this error of the court was also material. The same comment hereinbefore set forth with respect to the refusal of the court to allow plaintiff in error to testify to said mistake of his

brother, John Joseph Phelan, applies with equal force to the error complained of in aforesaid specification XIV.

X.

Aforesaid specification XIX refers to the failure of the court to give the instruction requested by plaintiff in error, and which is in the words and figures as follows, to-wit [Tr. p. 129]: "You are instructed that you cannot presume, conjecture, guess or arrive at any conclusion as to the age of the plaintiff in error, Edward H. Phelan, from the mere fact that he was baptized on the 8th day of August, 1886."

Above instruction was requested in view of the testimony of said Harnett regarding the baptism of plaintiff in error by him on August 8th, 1886, and with a view of having the court, in some measure, at least, correct the error made by the court in allowing Father Harnett to testify to the baptism of Phelan on said August 8th, 1886. We earnestly contend that the failure of the court to give the above quoted instruction so requested was error, particularly and especially inasmuch as the Government failed to show any knowledge on the part of the parents of Phelan in the belief of the Catholic church with reference to infants dying without baptism and without proof by the Government there was any enjoined understanding or rule that infants should be baptized as speedily as possible after birth.

XI.

Aforesaid specifications of error XX and XXI and XXII relate to the error of the court in refusing to instruct the jury on the subject of the laws of the state of California, to the effect that such law did not require the person filing a declaration of homestead to set forth therein, either the name or the age or the number of his children, or the dates of their birth. On the cross-examination of Mrs. Phelan, counsel for the Government interrogated her about the homestead declaration that her husband had filed and which was set forth in her petition. [Tr. p. 89 *et seq.*] In view of the fact that the husband's homestead declaration had been read to the jury, setting forth that the declarant's family consisted of "wife and five children," instead of six children, the jury may have been left under the impression that the statement of the declarant, Thomas Phelan, as to the number of his children was correct, and consequently they probably were inclined to attach a greater degree of weight to such unverified statement in said declaration than they would ordinarily had they been instructed that the allegations of that part of the declaration respecting the number of children of the homestead claimant was not a statement that was required to be inserted therein, by the law of California, as it existed at the time said homestead declaration was filed.

XII.

Aforesaid specification XXIII refers to the error of the court in refusing to instruct the jury to return

a verdict acquitting the plaintiff in error, to which refusal of the court plaintiff in error duly excepted.

As stated in said specification no evidence whatever was adduced to prove that part of the charge in the indictment, to-wit: "He, the said Edward H. Phelan, then and there not being an officer or an enlisted man in the national army, or the navy, or the marine corps, or the naval militia, or the national guard in the service of the United States, or an officer in the reserve corps, or an enlisted man in the enlisted reserve in active service." [Tr. top of p. 7.]

Neither, as we contend, was there any definite evidence either introduced by the Government or disclosed upon the examination of any of the witnesses introduced by plaintiff in error directly proving that plaintiff in error was born on July 13th, 1886.

Mrs. Mary Isbell, the Government's only witness as to point of birth, testified that she did not remember that Mrs. Phelan was confined at about the same time that she was confined with her daughter, Rexie Dale [Tr. p. 41], that she couldn't say for certain whether Mrs. Phelan visited her about the time of the birth of her daughter or not, and that she couldn't say because she really did not remember, and that she really could not tell, *and, of course, she did not know anything about when Phelan was born.* [Tr. p. 42.] She declared she couldn't say because she did not know whether or not at the time Mrs. Phelan was confined with plaintiff in error she, the witness, was also confined with her daughter, Rexie Dale; and after being continually pressed as to what her memory of the occurrence was,

she said: "Well, I thought mine was the oldest. Of course, I could not say positively. I don't know anything about how much or anything about it, and I may be wrong in that." [Tr. p. 43.]

Edward H. Phelan testified that he was born March 13th, 1886, and his mother, Mary Phelan, and Mrs. Martinez, who was present at the time of Mrs. Phelan's confinement with her said son, testified that while she did not remember the month that Edward was born in, nevertheless she had had a child born before Edward was born, who was her son Caspar, and that Caspar was born January 6th, and that he was a year and a month or two months older than plaintiff in error. [Tr. p. 20.]

XIII.

The Conduct of the District Attorney in Commenting on the Exclusion of the Evidence of Certain Witnesses Owing to Objections by Defendant's Counsel Was Prejudicially Erroneous.

During the course of his argument to the jury, counsel for the Government commented adversely on the fact that certain witnesses called by the Government had not been permitted to testify, owing to objections made by defendant's counsel. The portion of Government's argument referred to is set out in the transcript at pages 127 and 128. Government's counsel stated, among other things, that defendant's counsel were suppressing the facts, and intimated that such facts, if testified to, would have been highly prejudicial to the defendant. This conduct on the part of

the District Attorney was error extremely prejudicial to the defendant. These remarks were assigned as error. [Tr. p. 128.]

"Where evidence was excluded on the objection of the defendant, it was improper for the District Attorney to comment on the motive of the defense in excluding it, but where the nature of the case was such that the comments could not have injuriously affected the defendant's cause, the error is not ground for a reversal."

People v. Romero, 143 Cal. 458.

The argument and insinuations made by counsel for the Government were intended to be and were highly prejudicial to this defendant, and not only did they not receive reproof at the hands of the court, but when defendant's counsel first objected to them, the court simply ordered the argument to proceed.

Counsel for the Government in making these remarks deliberately invited the jury to go outside of the evidence in the case in considering their verdict, and based his own statements on matters outside of the evidence. This was in violation of the rule as laid down in People v. Weber, 149 Cal. 325 (341).

We respectfully submit that because of errors herein complained of and the reasons hereinbefore set forth, the judgment of the District Court of the United States, Southern District of California, Southern Division, be reversed.

Respectfully submitted,

ISIDORE B. DOCKWEILER,
DOCKWEILER & MOTT,
Attorneys for Plaintiff in Error.

G. C. O'CONNELL,
Of Counsel.